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State v. Tena Appellant's Brief 2 Dckt. 40423

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. SANTOS TENA, Defendant-Appellant.	)	NO. 40423 CASSIA COUNTY NO. CR 2011-3106 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CASSIA

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STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, thirty-three-year-old Santos Tena entered a conditional guilty plea to felony possession of a controlled substance. Mr. Tena reserved his right to appeal the district court's denial of his motion to suppress evidence obtained when the authorities conducted a warrantless search of his bedroom. On appeal, Mr. Tena asserts that the district court erred when it denied his motion to suppress, because his mother did not have actual or apparent authority to consent to the search of his bedroom.

Statement of the Facts and Course of Proceedings

Cassia County Sheriff's Deputies Bernad and Garrett were dispatched to 491 E. Hwy. 81 in Declo to serve two warrants on Mr. Tena. (Presentence Investigation Report (*hereinafter,* PSI), pp.3, 10.) The warrants, both for failure to appear, were from Cassia County and Twin Falls County. (PSI, p.3, R., p.23.) Dispatch told the deputies that Veronica Tena (Mr. Tena's sister) reported that Mr. Tena was staying at that address and that his father thought people were bringing him drugs. (PSI, pp.3, 9, Tr., p.45, Ls.10-11.)

At the residence, the deputies contacted Rebecca Tena, Mr. Tena's mother. (PSI, p.3, Tr., p.7, Ls.5-6.) Ms. Tena and her husband owned the house. (Tr., p.8, Ls.1-4.) Mr. Tena had been paying his parents rent for a bedroom in the basement of the house. (Tr., p, 9, Ls.4-6, p.11, Ls.4-16.) The deputies asked whether Mr. Tena was at the residence, and Ms. Tena pointed down the stairs and stated that he was asleep. (PSI, p.3.) She called down to him, and Mr. Tena then came to the bottom of the stairs

and argued with her. (PSI, p.3.) The deputies were not able to tell what they were arguing about. (Tr., p.47, Ls.17-23.) The deputies then went to the bottom of the stairs and told Mr. Tena he was under arrest. (PSI, p.3.) Mr. Tena turned as if he was going back to his bedroom, but Deputy Bernad turned on his taser and shined it on Mr. Tena. (PSI, p.3.) The deputies then handcuffed Mr. Tena and had another deputy, Deputy Merrill, transport him to jail. (PSI, p.3, R., p.108, Tr., p.55, Ls.12-20.) As he was being taken from the house, Mr. Tena yelled (in English) to not let the deputies into the house or his bedroom. (Tr., p.55, L.17 – p.56, L.3, p.58, Ls.2-11.)

After Mr. Tena was taken from the house, Deputy Bernad and Deputy Garrett spoke with Ms. Tena at the front door of the residence. (R., p.108, Tr., p.29, L.25 – p.30, L.7.) The district court found that "Deputy Bernad asked Ms. Tena questions in English and she responded in English," and that at other times Deputy Garrett "provided Spanish interpretation for Deputy Bernad and Ms. Tena."[1] (R., p.108.) Deputy Garrett asked Ms. Tena if the deputies could search the residence, and she said yes. (R., p.108.) The district court also found that Deputy Garrett asked Ms. Tena "if she had access to the house," and she replied that she did. (R., p.108.) However, while Deputy Bernad testified that he "specifically asked" Deputy Garrett to ask Ms. Tena "if she had full access to all the house including Mr. Tena's room" (Tr., p.49, Ls.9-12), Deputy Garrett testified that he "didn't say anything about full house or anything" (Tr., p.33, Ls.5-14).

[1] At the suppression hearing, Ms. Tena testified that she does not speak or understand English. (Tr., p.17, Ls.21-22.) Deputy Garrett testified that he spoke to Ms. Tena in English and Spanish, and that she seemed to understand some of the English and would respond to some of the deputies' questions in English. (Tr., p.30, Ls.8-20.) Deputy Bernad testified that, while he spoke to Ms. Tena in English and she responded in English, she only spoke broken English. (Tr., p.46, L.20 – p.47, L.3, p.57, Ls.15-17.)

Deputy Garrett translated part of a consent to search form for Ms. Tena, and explained that it would allow the deputies to search the residence, including Mr. Tena's bedroom. (R., pp.108-09.) Ms. Tena then signed the consent form. (R., p.109.) The district court found that "Deputy Bernad did not observe any behavior on the part of Ms. Tena that made him think she was afraid or did not understand what the officers were saying to her."[2] (R., p.109.) Ms. Tena then took the deputies downstairs to Mr. Tena's bedroom, "without hesitating or asking any questions." (R., p.109.) The district court found that she told them that Mr. Tena "was lazy and that he hardly ever left his bedroom," and that she indicated that "she did his laundry and took meals to him in his bedroom."[3] (R., p.109.) Deputy Bernad saw that the bedroom door was halfway open and that it had an old skeleton key lock. (R., p.109.)

The deputies then searched Mr. Tena's bedroom. (R., p.109.) In the bedroom, Deputy Bernad found, in plain view, a baggie containing a white crystal substance. (PSI, p.3.) The baggie was next to a pocket knife. (PSI, p.3.) Later, the white crystal substance tested presumptively positive for methamphetamine. (PSI, p.3.) The deputy also found a pipe with a burnt brown residue inside, and a coin purse containing a glass pipe and five small baggies. (PSI, p.3.)

Mr. Tena was charged with one count of possession of a controlled substance, felony, in violation of I.C. § 37-2732(c)(1), and one count of possession of drug paraphernalia with the intent to use, misdemeanor, in violation of I.C. § 37-2734A.

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[2] However, Ms. Tena testified, "I was very nervous, and I didn't understand everything." (Tr., p.14, Ls.23-24.) She testified that she signed the consent form "because I didn't know what it was about, and I was very nervous, and I got scared." (Tr., p.15, Ls.9-10.)

[3] The district court based this finding on Deputy Garrett's testimony at the suppression hearing. (*See* Tr., p.33, L.21 – p.34, L.1.) Deputy Garrett's testimony on this point was disputed, because Ms. Tena testified that she did not tell the deputies that she did laundry or prepared food for Mr. Tena. (Tr., p.13, L.12 – p.14, L.2.)

(R., pp.21-22, 41-42.) He initially entered a not guilty plea to the charges. (R., pp.26, 54.) The State later amended the charges to add a persistent violator sentencing enhancement pursuant to I.C. § 19-2514, on account of Mr. Tena's 2002 convictions for possession of a controlled substance and possession of a controlled substance with intent to deliver. (R., pp.74-75.)

Mr. Tena subsequently filed a motion to suppress. (*See* R., p.77.) After conducting an evidentiary hearing,[4] the district court allowed the parties to brief the issues. (Tr., p.5, Ls.7-11, p.62, p.6-25). In his brief in support of the motion to suppress, Mr. Tena asserted that Ms. Tena did not have authority to consent to the search of the bedroom he rented from his parents. (R., pp.97-99.) In opposition to the motion to suppress, the State argued that Ms. Tena had actual authority to consent to the search, because she had access to the room and still exercised control over it. (R., pp.101-05.)[5]

The district court then denied Mr. Tena's motion to suppress. (R., pp.107-13.) The district court determined that "regardless of whether Ms. Tena had actual authority to consent to the search of [Mr. Tena's] bedroom, she had apparent authority to do so." (R., p.111.) Based on the underlying circumstances, "the officers reasonably believed that Ms. Tena had ready access and common control over [Mr. Tena's] bedroom as part of her residence, and that she could consent to a search." (R., p.112.)

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[4] The suppression hearing was held over the course of two days. (Tr., p.5, Ls.7-11, p.42, Ls.7-12.)

[5] In a reply brief untimely filed with the district court, Mr. Tena asserted that Ms. Tena did not have actual authority, because he was a tenant. (R., pp.115-17.) Mr. Tena also asserted that the search was unreasonable in light of the factors outlined in *State v. Benson*, 133 Idaho 152, 158 (Ct. App. 1999). (R., pp.116-17.)

According to the district court, there was "no evidence that [Mr. Tena] had a key to his bedroom door; that he used the old skeleton key lock to prevent access to his bedroom; that [Mr. Tena] used a more modern lock on his bedroom door; or that [Mr. Tena] had the ability to exclude his parents from his bedroom." (R., p.112.) Ms. Tena's statements that she did Mr. Tena's laundry and took meals to him in his bedroom gave rise "to a reasonable inference that [Mr. Tena] did not exclude Ms. Tena in any meaningful way from that area of her residence." (R., p.112.) Further, "Ms. Tena did not mention that [Mr. Tena] paid rent or that there was a rental agreement at the time of the search. There was nothing that the officers observed at the time of the search that would give rise to the inference that [Mr. Tena] and his parents had a landlord-tenant relationship." (R., p.112.) Thus, the district court determined that Ms. Tena had apparent authority to consent to the search, because the deputies' belief that she had authority to consent "was reasonable based on the totality of the circumstances." (R., p.112.)

Later, Mr. Tena entered into a conditional plea agreement with the State, and agreed to plead guilty to the possession of a controlled substance charge. (R., pp.127-28, 138-40.) The State would dismiss the possession of drug paraphernalia with the intent to use charge. (R., p.139.) Mr. Tena reserved his right to appeal the district court's denial of the motion to suppress. (R., p.131.) The district court accepted the guilty plea. (R., p.128.)

At sentencing, the parties stipulated to a unified sentence of seven years, with one year fixed. (R., p.158.) The district court imposed a unified sentence of seven years, with one year fixed. (R., pp.158-61.)

Mr. Tena then filed a timely Notice of Appeal. (R., pp.165-66.)

ISSUE

Did the district court err when it denied Mr. Tena's motion to suppress, because Ms. Tena did not have authority to consent to the search of his bedroom?

ARGUMENT

The District Court Erred When It Denied Mr. Tena's Motion To Suppress, Because Ms. Tena Did Not Have Authority To Consent To The Search Of His Bedroom

A. Introduction

Mr. Tena asserts that the district court erred when it denied his motion to suppress, because his mother, Ms. Tena, did not have authority to consent to the search of his bedroom. In this case, the district court determined that "regardless of whether Ms. Tena had actual authority to consent to the search of [Mr. Tena's] bedroom, she had apparent authority to do so." (R., p.111.) However, Ms. Tena did not have apparent authority to consent to the search because the facts known to the deputies prior to the search did not warrant a reasonable belief that she had authority to consent to a search of Mr. Tena's bedroom. Additionally, Ms. Tena did not have actual authority to consent to the search, because she was a landlord who could not give effective consent to a search or, alternatively, because she did not have common authority over the bedroom. Thus, Ms. Tena did not have authority to consent to the search of the bedroom.

"In reviewing an order granting or denying a motion to suppress evidence, the Court defers to the trial court's factual findings unless they are clearly erroneous; however, the Court freely reviews the determination as to whether constitutional requirements have been satisfied in light of the facts found." *State v. Hansen*, 151 Idaho 342, 345 (2011) (internal quotation marks omitted).

"Individuals have a reasonable expectation of privacy within their homes which is protected by the Fourth Amendment." *State v. Brauch*, 133 Idaho 215, 221 (1999). The Fourth Amendment of the United States Constitution and Article I, Section 17 of the Idaho Constitution prohibit unreasonable searches and seizures. U.S. Const. amend.

IV., Idaho Const. art., I, § 17. "A warrantless search is presumptively unreasonable." *Hansen*, 151 Idaho at 346. However, "[c]onsent voluntarily given by someone with authority is an exception to the warrant requirement." *Id.* The person giving consent "must have either actual authority to consent or authority that is reasonably apparent." *Id.* "The burden is on the State to show that the consent exception applies." *Id.*

B. Ms. Tena Did Not Have Apparent Authority To Consent To The Search Of Mr. Tena's Bedroom, Because The Facts Of This Case Did Not Warrant A Reasonable Belief That She Had Authority To Consent To A Search

Mr. Tena asserts that Ms. Tena did not have apparent authority to consent to the search of Mr. Tena's bedroom, because the facts known to the deputies prior to the search did not warrant a reasonable belief that Ms. Tena had authority to consent to a search.

If the person giving consent does not have actual authority to consent to a search, a warrantless consent search may only be upheld "as long as the police officer reasonably believes that the person giving consent has the authority to do so." *Hansen*, 151 Idaho at 346. "Police have a duty of reasonable investigation before they may rely upon the authority of a third party to consent to a search." *Brauch*, 133 Idaho at 221.

> As with other factual determinations bearing upon search and seizure, determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises? If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid.

Id. (quoting *Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990)). Thus, "the analysis related to a determination of whether a third party had apparent authority to consent to a search of premises is limited to what officers knew prior to a search of such premises." *State v. Robinson*, 152 Idaho 961, 966 (Ct. App. 2012).

The Idaho Court of Appeals has outlined the following factors for assessing the reasonableness of an officer's reliance on a third party's apparent authority to consent:

> First, the third party may not generally have "joint access . . . for most purposes"; his right of access may be narrowly prescribed. Second, the objector may not be an "absent . . . person"; he may be present at the time third party consent is obtained. Finally, the objector may not simply be "nonconsenting"; he may actively oppose the search.

State v. Benson, 133 Idaho 152, 158 (Ct. App. 1999) (quoting *United States v. Impink*, 728 F.2d 1228, 1233 (9th Cir. 1984)).

Mr. Tena submits that Ms. Tena did not have apparent authority to consent to the search of his bedroom, because the above facts did not "warrant a man of reasonable caution in the belief that [Ms. Tena] had authority over the premises." *See Brauch*, 133 Idaho at 221. The determination of whether Ms. Tena had apparent authority to consent to search hinges on "the facts available to the officer at the moment." *See id.* Applying the *Benson* reasonableness factors to the district court's findings of fact shows that Ms. Tena lacked apparent authority to consent to a search of Mr. Tena's bedroom.

First, Ms. Tena's right of access to Mr. Tena's bedroom was narrowly prescribed. *See Benson*, 133 Idaho at 158. In *Benson*, a case involving the question of whether a renter had apparent authority to consent to the search of a detached garage where the defendant and his girlfriend (who was the renter's daughter) lived, the Idaho Court of Appeals examined the renter's access to the garage. *Id.* The detectives in *Benson* asked the renter if the garage belonged to her, if she had access to the garage, and if she had "stuff" inside, and the renter replied yes to all three questions. *Id.* But the detectives also knew that the defendant and his girlfriend lived separately from the renter in the garage. *Id.* "In addition, both [the defendant and his girlfriend] demanded that the detectives leave the property and then strenuously objected to the detectives'

presence and entry into the garage." *Id.* Thus, "under the totality of the circumstances known to the detectives at the time they obtained [the renter's] consent," the *Benson* Court "conclude[d] that the detectives lacked an objectively reasonable basis to believe that [the renter] had joint access to and mutual use of the garage without some further inquiry." *Id.*

Here, the deputies also "lacked an objectively reasonable basis to believe that [Ms. Tena] had joint access to and mutual use of the [bedroom] without some further inquiry." *See id.* While the district court found that Ms. Tena stated that she had access to the house (R., p.108), Deputy Garrett testified that that he "didn't say anything about full house or anything" when he questioned her (Tr., p.33, Ls.5-14). Based on the deputies' cursory questioning about Ms. Tena's access to the house, they knew that she had access to the bedroom only for the limited purposes of doing Mr. Tena's laundry and bringing meals to him. (*See* R., pp.108-09, Tr., p.33, Ls.5-14.) There was also an argument between Mr. Tena and Ms. Tena after the deputies asked Ms. Tena to get her son. (Tr., p.47, Ls.9-13.) While the deputies were not able to tell what they were arguing about (Tr., p.47, Ls.17-23), it is conceivable that Mr. Tena and Ms. Tena were arguing about whether to let the deputies into his bedroom.

Additionally, as he was being taken from the house, Mr. Tena yelled to not let the deputies into the house or his bedroom. (Tr., p.55, Ls.17-20, p.58, Ls.2-11.) This was much like the situation in *Benson*, where the defendant and his girlfriend "strenuously objected to the detectives' presence and entry into the garage." *See Benson*, 133 Idaho at 158. Thus, Ms. Tena's right of access to Mr. Tena's bedroom was narrowly prescribed. At the time the deputies searched the bedroom, they lacked an objectively

reasonable basis to believe Ms. Tena had a right of joint access to the bedroom without conducting a further inquiry.

Second, Mr. Tena was present as a nonconsenting party to the search. While examining this factor in *Benson*, the Idaho Court of Appeals noted that the investigating detectives "were met with cooperation from [the renter] but with requests by [the defendant and his girlfriend] to leave the property." *Benson*, 133 Idaho at 158-59. "At each step of the detectives' investigation, they were implicitly, if not explicitly, aware that [the defendant and his girlfriend] claimed an interest in the garage superior to [the renter's] and did not want the detectives to enter." *Id.* at 159. The Court determined that, "[a]t a minimum, these factors should have cast doubt upon [the renter's] ability to give valid consent and put the detectives on notice that *further inquiry* into the parties' respective relationship to the premises was necessary." *Id.* (emphasis in original).

Similarly, in this case the deputies were presented with circumstances that "should have cast doubt upon [Ms. Tena's] ability to give valid consent and put the detectives on notice that *further inquiry* . . . was necessary." *See id.* (emphasis in original). Ms. Tena cooperated with the deputies by signing the consent form and taking the deputies to Mr. Tena's bedroom. (R., pp.108-09.) However, prior to the search the deputies also knew that Mr. Tena had argued with Ms. Tena after she went to get him, and that Mr. Tena yelled to not let the deputies search the house or the bedroom. (Tr., p.47, Ls.9-13, p.55, Ls.17-20, p.58, Ls.2-11.) Thus, the deputies should have been "aware that [Mr. Tena] claimed an interest in the [bedroom] superior to [Ms. Tena's], and did not want the [deputies] to enter." *See Benson*, 133 Idaho at 159.

Third, Mr. Tena actively objected to the deputies' entry and search of his bedroom. In *Benson*, the Idaho Court of Appeals observed that "[t]he fact that [the

defendant and his girlfriend] actively voiced their objections to the detectives, rather than simply acquiescing to their presence and entry by mere nonconsent, i.e., silence, is significant." *Benson*, 133 Idaho at 159. After discussing *State v. Frizzel*, 132 Idaho 522 (Ct. App. 1999), a case where the Court "addressed the issue of apparent authority in the context of a consensual vehicle search," the *Benson* Court stated that "*Frizzel* implies that an officer may not be able to rely on a third party's apparent authority to consent to a search when another party with a superior possessory interest in the property searched is present and objects or denies consent." *Benson*, 133 Idaho at 159.

In this case, Mr. Tena actively objected to the deputies' search. Mr. Tena did not simply acquiesce to the search through his silence. Rather, as discussed above, Mr. Tena yelled to not let the deputies into the house or his bedroom. (Tr., p.55, Ls.17-20, p.58, Ls.2-11.) Although there was no testimony as to the exact subject of the argument (*see* Tr., p.47, Ls.9-23), Mr. Tena's argument with Ms. Tena may further indicate that he was actively objecting to the search.

In *Benson*, the Idaho Court of Appeals ultimately held that "[t]he record before us fails to support the district court's conclusion that [the renter] had . . . apparent authority to give valid consent to a search of the garage in which [the defendant] was staying. *Benson*, 133 Idaho at 160. The detectives in *Benson* knew that the defendant and his girlfriend were living apart from the renter in the garage, that the renter had limited access to the garage, and that the defendant and his girlfriend demanded that the detectives leave the property. *Id.* at 159. "Despite these strong vocal objections, the detectives separated the parties and sought the consent of [the renter], knowing full well that they could not obtain such consent from either [the defendant or his girlfriend]." *Id.*

at 159-60. Further, "[t]he detectives never sought to establish [the defendant and his girlfriend's] interest in the garage, ignored their protests, and merely queried [the renter] very cursorily and superficially as to her interest in the property." *Id.* at 160. Thus, the court found "that such deliberate indifference to or conscious avoidance of [the defendant and his girlfriend's] interest in the garage, under the totality of the circumstances presented, renders the detectives' reliance on [the renter's] apparent authority *objectively unreasonable*." *Id.* (emphasis in original).

Mr. Tena asserts that the deputies' reliance on Ms. Tena's apparent authority was objectively unreasonable under the totality of the circumstances in this case. As discussed above, the application of the *Benson* reasonableness factors illustrates how similar the circumstances in this case are to those in *Benson*. Like the detectives in *Benson*, 133 Idaho at 159-60, the deputies here knew that Mr. Tena (because he yelled not to let the deputies into the house or his bedroom) would not consent to the search (R., pp.108-09, Tr., p.55, Ls.17-20, p.58, Ls.2-11). Like the detectives in *Benson*, 133 Idaho at 159, the deputies here knew that Ms. Tena had limited access to the bedroom and that Mr. Tena had objected to their entry and search of the bedroom (*see* R., pp.108-09, Tr., p.33, Ls.5-14, p.55, Ls.17-20, p.58, Ls.2-11). And like the detectives in *Benson*, 133 Idaho at 160, the deputies here "never sought to establish [Mr. Tena's] interest in the [bedroom], ignored [his] protests, and merely queried [Ms. Tena] very cursorily and superficially as to her interest in the property." (*See* R., p.108, Tr., p.33, Ls.5-14.) Thus, under the totality of the circumstances presented in this case, the deputies' reliance on Ms. Tena's apparent authority was objectively unreasonable. *See Benson*, 133 Idaho at 160.

Because the facts of this case did not warrant a reasonable belief that Ms. Tena had authority to consent to a search of Mr. Tena's bedroom, Ms. Tena did not have apparent authority to consent to the search. However, given the parties' arguments before the district court, this Court should also consider whether Ms. Tena had actual authority to consent to the search of the bedroom.

C. Ms. Tena Did Not Have Actual Authority To Consent To The Search Of Mr. Tena's Bedroom

Mr. Tena asserts that Ms. Tena did not have actual authority to consent to a search of Mr. Tena's bedroom, because Ms. Tena was a landlord who could not give effective consent to search. Alternatively, Ms. Tena did not have actual authority because she did not have common authority over the bedroom.

If there is no apparent authority to consent to a search, "then warrantless entry without further inquiry is unlawful unless authority actually exists." *Rodriguez*, 497 U.S. at 188-89. Actual authority to consent to a home search depends on the consenting person sharing "common authority" with the defendant over the premises searched, which rests upon the

> mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Hansen, 151 Idaho at 346 (quoting *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974)); *State v, Reynolds*, 146 Idaho 466, 473 (Ct. App. 2008). "Such common authority generally is shared by co-habitants of a residence." *Reynolds*, 146 Idaho at 473. Unlike with apparent authority, "the State is not limited to relying upon information known to the police at the time of their warrantless entry in order to prove actual

authority possessed by the person who consented to the search." *State v. Buhler*, 137 Idaho 685, 691 (Ct. App. 2002).

1. Ms. Tena Did Not Have Actual Authority To Consent To A Search Of Mr. Tena's Bedroom, Because Ms. Tena Was A Landlord Who Could Not Give Effective Consent To Search

"A landlord does not have actual authority to consent to a search of a tenant's home when the tenant is in actual possession." *Brauch*, 133 Idaho at 219 (citing *Chapman v. United States*, 365 U.S. 610, 616-17 (1961) and *State v. Johnson*, 110 Idaho 516, 519 (1986)). In *Johnson*, the Idaho Supreme Court held that the defendant's landlord "was without authority for purposes of either the Fourth Amendment or art. 1, § 17 to give effective consent to a search of [the defendant's] home." *Johnson*, 110 Idaho at 523. The *Johnson* Court explained that "the state was unable to present any evidence that [the] landlord had mutual use of the property or that [the defendant] assumed the risk that [the defendant's landlord] might permit the common area to be searched." *Id.* (internal quotation marks omitted). Additionally, the defendant "had a legitimate and reasonable expectation of privacy in his home," and there was "evidence that he was still residing there." *Id.* The Court noted that its holding was "consistent with what other courts have held in similar situations," pointing to cases concluding that "a lessor/landlord *cannot* give effective consent to a search of a rental house, an apartment, a room in a rooming house, a hotel, or even a locker." *Id.* at 523-24 (citations omitted) (emphasis in original).

Here, Ms. Tena did not have actual authority to consent, because she was a landlord who could not give effective consent to search Mr. Tena's bedroom while Mr. Tena, her tenant, was in actual possession of the bedroom. Ms. Tena testified that Mr. Tena had an informal arrangement to pay his parents $250.00 in monthly rent for

the bedroom. (Tr., p.11, Ls.4-12.) Mr. Tena had paid rent for "[a]bout one year." (Tr., p.11, Ls.15-16.) Ms. Tena also testified that Mr. Tena paid cash for the rent, and that she could not remember whether Mr. Tena had paid rent in the three months before the instant offense. (Tr., p.12, Ls.2-16.) However, the defense introduced as evidence a receipt showing that Mr. Tena had paid his father the rent due for the month of the instant offense. (Def. Ex. A; *see* Tr., p.18, L.22 – p.20, L.2.)

The above evidence establishes that Ms. Tena was Mr. Tena's landlord, and that Mr. Tena was in actual possession of the bedroom at the time of the search. Mr. Tena had regularly paid rent to his parents for the bedroom, paid the rent due for the month of the instant offense, and was residing in the bedroom at the time of the search. As discussed above, Ms. Tena had a narrowly prescribed right of access to the bedroom, and so the State presented little evidence "that [the] landlord had mutual use of the property or that [the defendant] assumed the risk that [the defendant's landlord] might permit the common area to be searched." *See Johnson*, 110 Idaho at 523 (internal quotation marks omitted). Further, Mr. Tena "had a legitimate and reasonable expectation of privacy in his home," i.e., the bedroom. *See Brauch*, 133 Idaho at 218; *Johnson*, 110 Idaho at 523. Thus, Ms. Tena was a landlord who did not have actual authority to consent to a search of Mr. Tena's bedroom. *See Brauch*, 133 Idaho at 219.

2. Ms. Tena Did Not Have Actual Authority To Consent To A Search Of Mr. Tena's Bedroom Because She Did Not Have Common Authority Over The Bedroom

Mr. Tena asserts that, even if this Court determines that Ms. Tena was not a landlord, she did not have actual authority to consent to a search of Mr. Tena's bedroom because she did not have common authority over the bedroom. As discussed above, actual authority to consent to a home search depends on the consenting person sharing

"common authority" with the defendant over the premises searched, which rests upon the "mutual use of the property by persons generally having joint access or control for most purposes . . . ." *Hansen*, 151 Idaho at 346.

In *Benson*, the Idaho Court of Appeals held that the renter (who was the mother of the defendant's girlfriend) did not have "common authority over the garage, and her consent to search cannot be upheld on this basis." *Benson*, 133 Idaho at 155-56. The renter told the detectives that the defendant and his girlfriend were living in the detached garage. *Id.* at 155. The renter also testified that, while she stored holiday decorations and a freezer in the garage, she considered the garage to be her daughter's residence. *Id.* The defendant's girlfriend babysat her brother's children in lieu of paying rent. *Id.* The garage was locked with a padlock when the defendant and his girlfriend were absent, and only the defendant and his girlfriend "had keys to the padlock and hence access to the garage at all times." *Id.* The renter "could not access the garage without obtaining [the girlfriend's or the defendant's] permission." *Id.*

The *Benson* Court "conclude[d] that [the renter] did not possess common authority over the garage for most (i.e. consent) purposes." *Id.* at 156. The renter "did not have mutual use, joint access or control over the garage for any purpose other than minimal storage." *Id.* Additionally, the defendant and his girlfriend did not assume the risk that the renter would consent to a search of the garage, because they padlocked the garage when they were absent and kept the only keys to the padlock. *Id.* "In effect, the relationship between [the renter] and [the defendant's girlfriend] was akin to that of a landlord-tenant." *Id.*

Conversely, in *State v. Ham*, the Idaho Court of Appeals held that the defendant's mother in that case "possessed sufficient use, control and authority"—i.e.,

common authority—"over the premises, including the closet in the bedroom occupied by [the defendant], to give valid consent to a warrantless search." *State v. Ham*, 113 Idaho 405, 407 (Ct. App. 1987). The nineteen-year-old defendant in *Ham* shared an apartment with his mother, and had an informal arrangement where he would pay rent for his bedroom. *Id.* at 405. However, the defendant had not paid rent for the month in which the search happened, and his mother had told him to vacate the apartment. *Id.* After officers went to the apartment as part of a burglary investigation, the defendant's mother consented to a warrantless search of the defendant's bedroom while the defendant was absent. *Id.* at 405-06. The officers found evidence related to the burglary in the bedroom's closet. *Id.* at 406. The district court denied the defendant's motion to suppress the evidence obtained in the search. *Id.* at 406.

On appeal, the *Ham* Court observed that the defendant's mother had "testified that she had free access to [the defendant's] bedroom" to pick up dirty dishes and laundry, and that she did so at least once every two days. *Id.* She also permitted the defendant to lock the bedroom door while he was at home and would knock before entering, but would not permit the defendant to lock the door when he was absent. *Id.* The defendant's mother also testified that the defendant frequently locked the bedroom door when he was home. *Id.* The Court stated that "[a]lthough [the defendant] claims to have had exclusive possession of his room it is clear from his actions and those of his mother that his control was subservient and subject to the power, authority, ownership and possession of his mother over the premises." *Id.* at 407. Thus, the Court concluded that the defendant's mother, at the least, "shared common control with [the defendant] over his bedroom, sufficient to support the validity of her consent to the search." *Id.*

The circumstances of this case, being closer to those in *Benson* than to those in *Ham*, show that Ms. Tena did not have common authority over Mr. Tena's bedroom. While Mr. Tena's bedroom was inside Ms. Tena's house, much like the defendant's bedroom in *Ham* was inside his mother's apartment, 113 Idaho at 405, the circumstances of this case otherwise bear more similarities to the circumstances in *Benson*. Like the renter in *Benson*, 133 Idaho at 155-56, Ms. Tena had access to the bedroom only for limited purposes. As discussed above, Ms. Tena had access to the bedroom only for the limited purposes of doing Mr. Tena's laundry and bringing meals to him. (*See* R., p.109.) Unlike the defendant in *Ham*, 113 Idaho at 405, Mr. Tena paid rent for the month in which the search occurred (Def. Ex. A), and had not been told to vacate the bedroom. The defendant in *Ham* was only nineteen years old at the time of the search, 133 Idaho at 405, while Mr. Tena was thirty-one years old at the time of the search here. (*See* PSI, pp.2-3.) And while the defendant's mother in *Ham* accessed the defendant's bedroom at least once every two days, 133 Idaho at 406, Ms. Tena did not indicate how frequently she accessed Mr. Tena's bedroom for taking care of laundry and meals (*see* R., p.109). Thus, Ms. Tena "did not possess common authority over the [bedroom] for most (i.e. consent) purposes," and "[i]n effect, the relationship between [Ms. Tena] and [Mr. Tena] was akin to that of a landlord-tenant." *See Benson*, 133 Idaho at 156. Because Ms. Tena did not have common authority over Mr. Tena's bedroom, she did not have actual authority to consent to a search.

In sum, Ms. Tena did not have apparent authority or actual authority to consent to a search of Mr. Tena's bedroom. Thus, the district court erred when it denied Mr. Tena's motion to suppress. The district court's denial of the motion to suppress should be reversed, and the case should be remanded for further proceedings.

CONCLUSION

For the above reasons, Mr. Tena respectfully requests that this Court reverse the district court's denial of his motion to suppress and remand his case to the district court for further proceedings.

DATED this 10th day of July, 2013.

BEN PATRICK MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of July, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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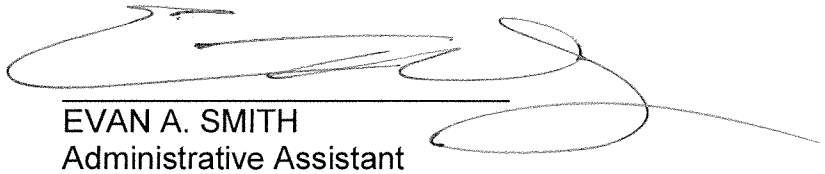

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BPM/eas